APPENDIX A.

Opinion of Judge Hulbert dismissing the complaint as to respondents Potter and Johnston in the case of *Kimmich* v. *New York Clearing House Association, et al.*

"HULBERT, *D. J.*:

On August 30, 1932 the plaintiff opened a personal checking account with Harriman National Bank & Trust Company (hereinafter called the Bank) by an initial deposit of $750.83.

On March 4, 1933 the Governor of the State of New York declared a Bank Holiday, and on March 6, 1933 the President of the United States proclaimed a Bank Holiday, which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date.

The Bank never reopened for regular business. On or about March 13, 1933 the Comptroller of the Currency of the United States appointed Henry E. Cooper as Conservator of the Bank and on or about October 16, 1933, appointed Frederick V. Goess, Receiver, in which capacity Mr. Goess is still acting.

On May 8, 1933 the balance to the credit of the plaintiff on the books of the Bank was $939.50 but his claim has been reduced by dividends declared and paid in liquidation to $196.25.

Plaintiff sues on behalf of himself and all other depositors similarly situated to enforce a claim of tort liability based upon the alleged misrepresentation and fraud of the defendants other than Goess the Receiver, whom he seeks to join

as a party plaintiff, or in the alternative, requests the appointment of a co-receiver.

The complaint is the product of a layman's draftmanship and for that reason the court has given special care in the consideration of its sufficiency (Rule 8 (f)) to determine whether it substantially complies with the requirements of subdivisions (a) and (e) of said Rule 8, Federal Rules of Civil Procedure.

Plaintiff is a citizen and resident of the State of New York.

The New York Clearing House Association is alleged to be an unincorporated voluntary association of banks,

> "with a constitution amended from time to time in an effort to give official and legal status to its acts and that the boards of Directors of member banks ratify such constitution in confirmation of such members' adherence to the rules, regulations and policies of the association, and that a committee consisting of five officers of member banks designated as the Clearing House Committee together with the President of the Association who acts as ex-officio member, has full charge of the affairs of the Association."

The complaint does not allege who the President or Treasurer of the Association is, nor the names of its member banks.

Rule 17 (b) Federal Rules of Civil Procedure, provides:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined

by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

At common law an unincorporated association could not maintain an action in New York in its name, or be sued in its name and was required to sue and be sued in the names of all associates as parties plaintiff or defendant. *Saxer* v. *Democratic Co. Committee* (Erie County) 291 N. Y. S. 18. But, General Associations Law, (Chap. 915, Laws N. Y. 1920) Section 13, changed that and an action or a special proceeding may be maintained against the President or Treasurer of such an association and any partnership or other company of persons which has a President or Treasurer is deemed an association within the meaning of that section.

The return made by the Marshal discloses that service of the summons and complaint on the New York Clearing House Association was made by delivering to and leaving a copy, together with a copy of the bill of complaint, with E. L. Beck, as Manager of said association. The statute was not complied with. *Hagan* v. *Bricklayers' etc.*, 143 Misc. 591.

The motion made on behalf of the New York Clearing House Association to quash the service of the summons must be granted.

William C. Potter is Chairman of the Board of Directors of Guaranty Trust Company of New York, and Percy H. Johnston is the President of the Chemical Bank & Trust Company of New York, and each is a member of the Clearing House Committee of the New York Clearing House Association, but the complaint does not disclose citizenship and residence of either of them.

Plaintiff's prayer for relief

"demands judgment against the defendants for the sum of Nine Hundred Thirty-nine and 80/100 ($939.80) with interest thereon from March 14, 1933" (less the dividends heretofore paid in liquidation)

* * * * *

"all other unsecured depositors, demand judgment against the defendants for general damages in the full amount of their respective deposits with interest thereon from March 14, 1933" (less payments)

* * * * *

"and for such other general damages and such special damages as they may have suffered, with costs and disbursements, and the plaintiffs pray for judgment requiring the defendants to pay full damages upon such terms and conditions as to the court may seem proper."

The test as to when aggregation of claims will be permitted is stated in *Clay* v. *Field*, 138 U. S. 464, 479:

"* * * if several persons be joined in a suit * * * and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction."

In *Clark* v. *Paul Gray*, 83 L. Ed. 737, Mr. Justice Stone said at page 741:

"It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the District Court, and that those amounts cannot

be added together to satisfy the jurisdictional requirements."

Plaintiff contends, however, that a Federal question is involved which gives jurisdiction regardless of diversity of citizenship or the $3000 requirement. He asserts that in the administration of the duties of the Comptroller in the exercise of control and supervision over National Banks, the defendants are alleged to have "brought about a violation of Sections 55, 191 and 192 of Title 12, Chap. 2 of the Consolidated Laws of the United States" and that, moreover, since he has made the Receiver of the Bank a party, jurisdiction thereby is established. The plaintiff being a layman has wholly misconceived the scope of Sections 55, 191 and 192 of Title 12, Chap. 2 of the U. S. C. A. Motions granted as to the defendants Potter and Johnston. Settle orders.

Dated: N. Y. Aug. 5, 1939.

HULBERT,
U. S. D. J."

Opinion of Judge Hulbert denying plaintiff's motion for reargument in the case of *Kimmich* v. *New York Clearing House Association, et al.*

"HULBERT, *D. J.*:

Motion for reargument denied.

The plaintiff sues as an individual and the balance due him as a depositor is $196.25. While he states in the prayer for relief in his complaint that "all other unsecured depositors demand judgment against the defendants for general damages in the full amount of their respective deposits" less payments "and for such other general damages and such special damages as they may have suffered" the nature of the action is to be determined by the pleading and it clearly appears to sound in tort for "fraud, deception, conspiracy and other unlawful combinations."

Plaintiff places great reliance upon *Michelsen* v. *Penney*, 10 F. Supp. 537. In that case the defendant was a director; two of the plaintiffs were depositors and the third was president of a corporation depositor. They constituted a depositors committee and sued both in their own names and as assignees of a number of other depositors whose names and deposits were set forth on an attached schedule and exceeded $3,000; they also sued on behalf of all other depositors similarly situated. They alleged a demand upon the Comptroller of the Currency and the Receiver that suit be brought against defendant and refusal to sue. Such a factual situation does not exist here. Potter and Johnston are sued as individuals. The receiver is named as a defendant, as plaintiffs says, to give the court jurisdiction, but it does nothing of the kind. In a case so complicated upon the facts and the law it is unfortunate for the plaintiff that he is not a lawyer or represented by someone who is.

Dated: N. Y. Nov. 24, 1939.

HULBERT,
U. S. D. J."

Opinion of Judge Conger dismissing the complaint as to the defendant Receiver, Frederick V. Goess, in the case of *Kimmich* v. *New York Clearing House Association, et al.*

"CONGER, *D. J.*:

Motion of the defendant Frederick V. Goess, Receiver of the Harriman National Bank and Trust Co., to dismiss the action is granted as to him.

In arriving at this decision, I have followed the decision of Judge Hulbert in dismissing the action against the other defendants herein as well as his opinion denying the motion for a reargument.

As the case stands now, there are only two parties to the action, the plaintiff and the defendant.

Adopting the conclusions and principles laid down by Judge Hulbert in his decision dismissing the complaint as to the other defendants, I have come to the conclusion that (1) this court lacks jurisdiction, (2) that plaintiff has failed to state any claim against this defendant within the jurisdiction of this court and (3) that plaintiff has failed to state any claim upon which relief could be granted against this defendant.

Settle order on notice.

Dated: Dec. 13, 1939.

EDWARD CONGER,
U. S. D. J."